LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
FEB 28 1966
JOHN DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1965
No. 1072

JOSEPH H. THAYER and JUDITH MAGRUDER,
Petitioners,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

Petition for Writ of Certiorari to the Supreme Court of the State of California.

JOSEPH A. BALL,
120 Linden Avenue,
Long Beach, Calif. 90802,
Attorney for Petitioners.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

SUBJECT INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	3
Statute involved	3
Provisions of the Constitution involved	3
Statement of the case	3
Reasons why certiorari should be granted	8
1. The constitutional standard applicable to search and seizure of private papers	8
2. The decision of the California Court is in conflict with decisions from other states	12
3. California has extended the "Instrumentality of Crime" exception beyond the scope of Lefkowitz and other cases which have been decided by this court	14
4. Private business records are protected from seizure by the Fourth and Fifth Amendments	14
Conclusion	15
Appendix. Opinion of the Supreme Court of the State of California	App. p. 1

TABLE OF AUTHORITIES CITED

Cases — Page

Abel v. United States, 362 U.S. 217, 80 S. Ct. 683, 4 L. Ed. 668 12

Boyd v. United States, 116 U.S. 616, 6 S. Ct. 524, 29 L. Ed. 746 ..... 7, 8, 9, 11, 12, 13, 14

Bushouse v. United States, 67 F. 2d 843 11

Davis v. United States, 328 U.S. 582, 66 S. Ct. 1256, 90 L. Ed. 1453 11

Go Bart Importing Co. v. United States, 282 U.S. 344, 515 S. Ct. 153, 75 L. Ed. 374 ..... 10, 15

Gouled v. United States, 255 U.S. 298, 41 S. Ct. 261, 65 L. Ed. 647 ..... 7, 8, 9, 10, 11, 12, 13, 14, 15

Harris v. United States, 331 U.S. 141, 67 S. Ct. 1098, 91 L. Ed. 1399 11

Jones v. United States, 362 U.S. 257, 80 S. Ct. 725, 4 L. Ed. 2d 697 7

Mapp v. Ohio, 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 11

Marron v. United States, 275 U.S. 192, 48 S. Ct. 74, 72 L. Ed. 231 ..... 10, 14, 15

On Lee v. United States, 343 U.S. 747, 72 S. Ct. 967, 96 L. Ed. 1270 9

People v. Carroll, 38 Misc. 2d 630, 238 N.Y.S 2d 640 ..... 12, 13

People v. Gale, 46 Cal. 2d 253 7

People v. Grossman, 45 Misc. 2d 557, 257 N.Y.S. 2d 261 13

People v. Jaeger, 145 Cal. App. 2d 792 7

People v. Martin, 45 Cal. 2d 755 7

Shapiro v. United States, 335 U.S. 1, 68 S. Ct. 1375, 92 L. Ed. 1787 ..... 11, 15

Page

State v. Bisaccia, 45 N.J. 504, 213 A. 2d 185 ....12, 13

Takahashi v. United States, 143 F. 2d 118 ..10, 14, 15

United States v. Lefkowitz, 285 U.S. 452, 52 S. Ct. 420, 76 L. Ed. 877 .....7, 10, 14, 15

United States v. Peisner, 311 F. 2d 94 11

United States v. Rees, 193 F. Supp. 849 11

United States v. Stern, 225 F. Supp. 187 11

Woo Lai Chun v. United States, 274 F. 2d 708 11

Zap v. United States, 328 U.S. 624, 66 S. Ct. 1277, 90 L. Ed. 1477 .....11, 15

Rules

Rules of the Supreme Court of the United States, Rule 19 8

Statutes

California Penal Code, Sec. 1524(4) 3, 12

New York Code of Criminal Procedure, Sec. 792 13

New York Code of Criminal Procedure, Sec. 792(4) 13

United States Code Annotated, Title 28, Sec. 1257-(3) 2

United States Constitution, Fourth Amendment 2, 3, 5, 9, 11, 12, 14

United States Constitution, Fifth Amendment ....2, 3 .....9, 11, 14

United States Constitution, Fourteenth Amendment 2, 3, 6, 8

IN THE

Supreme Court of the United States

October Term, 1965
No. .....

JOSEPH H. THAYER and JUDITH MAGRUDER,
Petitioners,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

Petition for Writ of Certiorari to the Supreme Court of the State of California.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners Joseph H. Thayer and Judith Magruder pray that a writ of certiorari issue to review the judgment of the Supreme Court of California, entered on December 6, 1965.

Opinion Below.

The Opinion of the Supreme Court of the State of California is printed in 63 Advance California Reports 664, published December 17, 1965. A copy of the Opinion is attached as an Appendix to this petition.

Jurisdiction.

1. The judgment of the Supreme Court of the State of California was entered on December 6, 1965. A pe-

tition for rehearing was denied on January 5, 1966. The judgment became final under California rules of appeal on January 6, 1966.

2. The jurisdiction of this court is invoked under 28 USCA 1257(3).

3. Each petitioner raised questions in the state courts arising under the Constitution of the United States which are sought to be reviewed by this petition as follows:

(a) By objection to evidence on the ground that the seizure of the defendant Thayer's private handwritten notes and papers and the subsequent use as evidence, which incriminated him, violated each defendant's rights under the Fourth, Fifth and Fourteenth Amendments to the United States Constitution. [Rep. Tr. Vol. I, pp. 54-68, incl.; p. 70; p. 75; p. 79; p. 86.]

(b) On appeal to the District Court of Appeal of the State of California,[1] in briefs and oral arguments, these petitioners urged that their rights guaranteed by the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States had been violated.

(c) In briefs and oral argument before the Supreme Court of the State of California.

---

[1]The Opinion of the District Court of Appeal reversed the conviction of the defendants and held that the constitutional rights of the defendants had been violated. This opinion was published in the advance sheets 234 A.C.A. 961, and in 44 Cal. Rptr. 18. The decision is not published in the permanent California Appellate Reports, because the California Supreme Court granted a petition for hearing.

Question Presented.

May the State of California seize by search warrant the private papers of a person from his lawful possession and use those private papers to convict that person of a crime?

Statute Involved.

Section 1524(4), Penal Code of California:

> "A search warrant may be issued upon any of the following grounds:
>
> . . . .
>
> "4. When the property or things to be seized consists of any item or constitutes any evidence which tends to show a felony has been committed, or tends to show that a particular person has committed a felony."

The Supreme Court of the State of California has held that §1524(4) of the Penal Code of California does not offend against any provision of the United States Constitution. Petitioners contend that said section is unconstitutional insofar as it permits the seizure of a person's private papers for use in the criminal prosecution of their owner.

Provisions of the Constitution Involved.

Fourth, Fifth and Fourteenth Amendments to the United States Constitution.

Statement of the Case.

Petitioner Joseph H. Thayer has been a medical doctor in California since 1935. Petitioner Judith Magruder was his office assistant [Rep. Tr. Vol. II, pp. 416, 419]. In 1957 Thayer began to treat indi-

gents whose medical bills were paid by the County of Los Angeles. As is usual in a doctor's officer, Thayer maintained a written history of each patient. He personally recorded his observations, diagnosis, and treatment of the patient on each visit. If he did not make an entry in the history on the day of the patient's visit, he would make an entry in the history on the next day. [Rep. Tr. Vol. II, pp. 422-424.] Once a month the clerical help in his office prepared a "medical care statement" for each indigent. This was a form furnished by the Department of Social Welfare of California. Presentation of a "medical care statement" to the County of Los Angeles was a claim for payment of services and supplies rendered during the previous month to the indigent. [Rep. Tr. Vol. I, pp. 12, 13.]

The Department of Social Welfare commenced an investigation of the claims which Dr. Thayer had filed with the county for payment. On July 7, 1962, the district attorney of Los Angeles County caused a search warrant to issue which directed police officers to enter Dr. Thayer's office in Los Angeles, California, and to seize the medical histories which were described in the warrant. [Rep. Tr. Vol. I, p. 44, line 15, to p. 55, line 26.] The officers entered the doctor's office and proceeded to search the doctor's private files. They were unable to find all of the files described in the search warrant. [Rep. Tr. Vol. I, p. 55.] Taking advantage of their entry under warrant, they browsed through other files in the office which were not described in the warrant. From this exploratory search they obtained other names, and from this information they obtained a second search warrant which was issued and served before the officers left the premises. [Rep. Tr. Vol. I, pp. 93, 94.] The of-

ficers then seized, not only those files which they could find which were described in the first warrant, but many others which were described in the second warrant. In addition they also seized "four, five or six that were not in either one of these warrants". [Rep. Tr. Vol. I, p. 57, lines 19-22.] The information obtained from the search of the doctor's files was submitted to the county grand jury, and the doctor, his secretary, Judith Magruder, and two other defendants were indicted and charged with crime. [Indictment, Clk. Tr. pp. 1-65, incl.] The indictment contained sixty counts, each of which charged that Thayer, Magruder and another named defendant had presented for allowance and payment a false and fraudulent claim to the Courty of Los Angeles. [Amd. indictment, Clk. Tr. pp. 66a-125.] All four defendants were charged with one count of conspiracy to commit the crime of presenting a false claim to the County of Los Angeles. [Amd. indictment, Clk. Tr. p. 126.] A trial jury convicted petitioners Thayer and Magruder on twenty-two counts, each of which charged that the defendants had presented a false claim to the County of Los Angeles and on one count of conspiring to submit false claims to the County of Los Angeles. [Verdicts, Clk. Tr. pp. 214-259.] The other defendants were exonerated.

During the course of the trial, the prosecution offered into evidence the private records of the doctor which had been seized under the two warrants. [Rep. Tr. Vol. I, pp. 4e-4g; p. 68.] The defendant Thayer objected to the introduction of the evidence upon the ground that if received these private papers would in effect tend to incriminate him; that they were seized in violation of the Fourth Amendment to the United States

Constitution; that the constitutional rights of the doctor were violated by the seizure and would be violated if the evidence were used to convict him; and that California was required to follow these constitutional standards by reason of the Fourteenth Amendment to the Constitution of the United States. [Rep. Tr. Vol. I, pp. 69-151, incl.] The court first ruled that all patient histories which were seized under the warrants could be admitted in evidence against Dr. Thayer and co-defendants. [Rep. Tr. Vol. I, p. 84.] The court reconsidered that ruling and struck from evidence all patient histories which had been seized under the second warrant. The jury was permitted to consider patient histories which had been seized under the first warrant. [Rep. Tr. Vol. I, pp. 151-152.] The petitioner Magruder joined in the objections to the introduction of the evidence urged by Thayer. [Rep. Tr. Vol. I, p. 86.]

The prosecution contended that the "medical assistance claims" listed office visits which were not recorded on the patients' histories. [Rep. Tr. Vol. I, p. 100.] In many instances the medical assistance claim filed with the county listed more visits than were recorded on the patient's history. The prosecutor compared the entries on the two documents, *i.e.*, compared the patient's history with the "medical assistance claim," and drew the conclusion that many visits for which the doctor claimed payment did not occur. As the histories were in Dr. Thayer's own handwriting, they were used as a written admission by Thayer that certain claims against the county were false. The gist of the crime was "filing of false claims". The patients' histories were obviously no part of the charged crime, but they were a vital part of the prosecution's proof.

The private records of the doctor were truly persuasive. The jury acquitted him on some counts where the patient denied that he had visited the doctor on all of the occasions listed in the claim. But the jury convicted on several counts where the only evidence was the comparison of the medical assistance claim with the doctor's handwritten patient's history. Thayer was therefore convicted on many counts solely through his own histories and diaries which had been recorded by him for the purpose of treating his patients.

The defendant Magruder joined in all of the objections stated by Thayer to the introduction of the evidence. [Rep. Tr. Vol. I, p. 86.] She is therefore entitled to the same constitutional protection as Thayer under the law of California. *People v. Martin* (1955), 45 Cal. 2d 755; *People v. Gale* (1956), 46 Cal. 2d 253; *People v. Jaeger* (1956), 145 Cal. App. 2d 792; and she is entitled to constitutional protection under federal law. *Jones v. United States* (1960), 362 U.S. 257, 266-267 (80 S. Ct. 725; 4 L. Ed. 2d 697).

California has therefore secured a conviction of crime on evidence that should have been excluded if *Boyd v. United States* (1886), 116 U.S. 616 [6 S. Ct. 524, 29 L. Ed. 746]; *Gouled v. United States* (1921), 255 U.S. 298 [41 S. Ct. 261, 65 L. Ed. 647], and *United States v. Lefkowitz* (1932), 285 U.S. 452 [52 S. Ct. 420, 76 L. Ed. 877], and other cases, declare a constitutional standard of due process which is applicable to state criminal procedures.

The District Court of Appeal of California felt that its decision was controlled by the Boyd-Gouled rule and reversed the conviction. (44 Cal. Rptr. 18.) The Supreme Court of California granted a hearing and af-

firmed the conviction. The California Supreme Court, through Chief Justice Traynor, conceded that the rule of *Gouled* would require exclusion of the evidence, but declared that *Gouled* did not state a Constitutional standard and "has no application in California". (App. p. 10.)

A serious constitutional question of national importance is therefore presented to this court because of the bold statement of the California Supreme Court. The question is: Do *Boyd* and *Gouled* declare a constitutional standard of due process which the state courts must apply by reason of the Fourteenth Amendment to the Constitution of the United States?

Reasons Why Certiorari Should Be Granted.

The Supreme Court of California has decided constitutional questions of substance in a way which is not in accord with the applicable decisions of the Supreme Court of the United States (Rule 19, Rules of the Supreme Court of the United States).

1. The Constitutional Standard Applicable to Search and Seizure of Private Papers.

The court first declared the constitutional standard relied upon by petitioners in *Boyd v. United States, supra.**

> "Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods is within the condemnation of that judg-

**Boyd* was cited to the court on objection to the evidence [Rep. Tr. Vol. I, p. 70].

ment. In this regard the Fourth and Fifth Amendments run almost into each other."

(*Boyd v. United States,* 116 U.S. 616 at p. 630).

In *Gouled v. United States* (1921), 255 U.S. 298 [41 S. Ct. 261, 65 L. Ed. 653], this court felt bound by the Boyd doctrine to exclude certain papers which had been seized through search warrant from Gouled's office. The California court concedes that Gouled held that the search and seizure in that case violated the Fourth and Fifth Amendments (Appendix, p. 6).

"The same papers being involved, the answer to this question must be in the affirmative; for, they having been seized in an unconstitutional search, to permit them to be used in evidence would be, in effect, as ruled in the *Boyd* case, to compel the defendant to become a witness against himself." (255 U.S. at p. 311).

But Justice Traynor for the California court argues that this court has abandoned Gouled. He notes that the court "refused without explanation to apply it to evidence other than tangible objects, such as that obtained by electronic devices designed to intercept conversation . . ." (citing *On Lee v. United States* (1952), 343 U.S. 747, 753 [72 S. Ct. 967, 96 L. Ed. 1270]; Appendix, p. 6).

On Lee is not within the *Gouled* rationale. It would have been necessary for this court to extend *Gouled* in order to exclude the evidence obtained by trickery in *On Lee.* Failure to extend *Gouled* to cover *On Lee's* facts does not indicate an abandonment of the constitutional principle declared in *Boyd* and *Gouled.*

Justice Traynor also believes that *Marron v. United States* (1927), 275 U.S. 192 [48 S. Ct. 74, 72 L. Ed. 231], severely restricted the scope of *Gouled* when it introduced the instrumentality exception. But only four years later in *Go Bart Importing Co. v. United States* (1931), 282 U.S. 344 [515 S. Ct. 153, 75 L. Ed. 374] the court reaffirmed its position in *Gouled.* The following year (1932) in *United States v. Lefkowitz,* 285 U.S. 452 [52 S. Ct. 420, 76 L. Ed. 877], Justice Butler (who wrote the opinion in *Marron*) severely limited the effect of *Marron* by holding that a search pursuant to service of a warrant of arrest which yielded records of criminal bootlegging activity could not be used in evidence against the defendants. The language is unequivocal:

> "Respondents' papers were wanted by the officers solely for use as evidence of crime of which respondents were accused or suspected. They could not lawfully be searched for and taken even under a search warrant issued upon ample evidence and precisely describing such things and disclosing exactly where they were. *Gouled v. United States,* 255 U.S. 298, 310, 65 L. ed. 647, 653, 41 S. Ct. 261." *United States v. Lefkowitz,* 285 U.S. 452 at 464 and 465.

Lefkowitz is dismissed as a precedent by Justice Traynor upon the excuse that it only penalized an exploratory search. No decision by this court has ever taken that view of Lefkowitz.

In *Takahashi v. United States* (9th Cir. 1944), 143 F. 2d 118, the defendant was charged with filing false and fraudulent statements in an application to export

goods. The court suppressed seized documents which would prove that defendant proposed to ship certain goods to Japan in violation of a presidential order. In *Bushouse v. United States* (6th Cir. 1933), 67 F. 2d 843, liquor, supplies, books and memoranda relating to the liquor business were seized by search warrant. The court reversed an order of the lower court which refused to quash the search warrant. In *Shapiro v. United States* (1948), 335 U.S. 1 [68 S. Ct. 1375, 92 L. Ed. 1787], the court drew a distinction between private records which cannot be seized by warrant, and records required by law, which may be seized. See also language in *Mapp v. Ohio* (1961), 367 U.S. 643, 646-647 [81 S. Ct. 1684, 6 L. Ed. 2d 1081].*

Other cases quoted in the opinion of the California court do not bear out the theory that this court has abandoned the *Boyd-Gouled* rule. In *Harris v. United States* (1947), 331 U.S. 141 [67 S. Ct. 1098, 91 L. Ed. 1399], the question discussed was the legality of the search. No private papers had been seized. The draft cards which were seized were government property to which the defendant had no right to possession. *Zap v. United States* (1946), 328 U.S. 624 [66 S. Ct. 1277, 90 L. Ed. 1477], is a consent to search case. A party who freely waives protection of the Fourth and Fifth Amendments cannot later claim that the search was unreasonable. In *Davis v. United States* (1946), 328 U.S. 582 [66 S. Ct. 1256, 90 L. Ed. 1453], both the majority and the dissent conceded that private papers

---

*Other recent cases applying the *Boyd-Gouled* rule: *United States v. Rees* (1961 DC MD) 193 F. Supp. 849; *United States v. Stern* (1964 DC NY) 225 F. Supp. 187; *Woo Lai Chun v. United States* (1960 9th Cir.) 274 F. 2d 708; *United States v. Peisner* (1962 4th Cir.) 311 F. 2d 94.

of the defendant could not be seized under search warrant.

In *Abel v. United States* (1960), 362 U.S. 217 [80 S. Ct. 683, 4 L. Ed. 668], Justice Frankfurter, speaking for the majority, declared the existing standard:

> "We have held in this regard that not every item may be seized which is properly inspectable by the government in the course of legal search; for example, private papers desired by the government merely for use as evidence may not be seized no matter how lawful the search which discovers them," (Citing *Gouled v. United States, supra*), 362 U.S. at pp. 234-235.

Section 1524(4) Penal Code of California is therefore unconstitutional according to the standard of Fourth Amendment interpretation set forth in Gouled.

2. The Decision of the California Court Is in Conflict With Decisions From Other States.

As justification of the announcement that California will not apply the rule of *Gouled v. United States, supra,* the California Supreme Court erroneously states: "Other state courts that have recently considered the matter have come to the same conclusion." (Appendix p. 10) The cases cited are: *State v. Bisaccia* (New Jersey 1965), 45 N.J. 504 [213 A. 2d 185]; and *People v. Carroll* (1964), 38 Misc. 2d 630 [238 N.Y.S. 2d 640]. But an examination of the New Jersey case and a later New York case discloses that neither New Jersey nor New York have rejected the *Boyd-Gouled* rule.

In *State v. Biscaccia, supra,* the New Jersey court upheld an entry without warrant into defendant's apartment, and the seizure of a pair of defendant's shoes. Chief Justice Weintraub reasoned that the Supreme Court of the United States had never held that the *Boyd* doctrine applied to tangibles other than private papers in possession of a defendant. But he did recognize that the *Boyd-Gouled* doctrine prevents seizure of a person's private papers by search warrant:

> "Indeed even a search for a specific identified paper may involve the same rude intrusion if the quest for it leads to an examination of all of a man's private papers. Hence it is understandable that some adjustment may be needed and presumably it is to that end that a search may not be made among a man's papers for a document which has evidentiary value alone." (213 A. 2d at 185.)

The second case cited by the California court, *People v. Carroll, supra,* did hold that §792(4) of the New York Code of Criminal Procedure extended the right of search and seizure to matters of "mere evidence." But the California court failed to cite the later case of *People v. Grossman* (1965), 45 Misc. 2d 557 [257 N.Y.S. 2d 261, 281], in which the New York court held §792 of the New York Code of Criminal Procedure unconstitutional to the extent that it might authorize a search and seizure of tangibles which are "mere evidence" and intangibles which are in the nature of conversations and verbal statements. In 1965 this New York court believed that *Boyd* and *Gouled* stated an inflexible constitutional standard.

3. California Has Extended the "Instrumentality of Crime" Exception Beyond the Scope of Lefkowitz and Other Cases Which Have Been Decided by This Court.

Patient histories maintained by the doctor in his office were records of a legitimate medical practice. If a crime was committed, it was committed, according to the indictment, when the defendants filed a written claim with the County of Los Angeles. The classification of these private papers as instruments of the crime springs from the distorted view which Justice Traynor of the California court takes towards the entire series of *Boyd-Gouled* decisions.

Compare these innocent records which record the details of a legal and legitimate medical practice with: the invoice which betrayed the details of customs avoidance which was excluded from evidence in *Boyd;* the contract and bills for services which outlined a plan for crime which were excluded in *Gouled;* and the records of criminal bootlegging activity which were seized on probable cause and excluded in *Lefkowitz;* or the documents showing an intention to ship goods to Japan in violation of a presidential order excluded in *Takahashi v. United States* (9th Cir. 1944), 144 F. 2d 118, *supra.* A proper application of the constitutional standard would have prevented seizure of Dr. Thayer's patient histories and would have excluded them from evidence.

4. Private Business Records Are Protected From Seizure by the Fourth and Fifth Amendments.

Business records are within the constitutional protection of the Fourth and Fifth Amendments if the past decisions of this court still have meaning. But the Supreme Court of California has now declared that *Mar-*

ron and Zap indicate that *business records* are not constitutionally protected from properly authorized search and seizure (Appendix p. 11) The two cases cited declare no such unorthodox principle. The papers seized in *Gouled, Go Bart, Lefkowitz, Takashashi* were all seized from a business office.

The California court also suggests that business records required to be kept by law are not constitutionally protected. (Citing *Shapiro v. United States, supra.*) But the patient histories kept by petitioner Thayer *were not required to be kept by law.* They were voluntarily kept by the doctor in accordance with what is established as good medical practice.

Conclusion.

Justice Traynor makes the argument for this petition. He states that *Gouled v. United States, supra,* is an "apt candidate for reinterpretation." (Appendix, p. 6). He then proceeds to give the case his own original interpretation which is contrary to the understanding of the various courts which have cited *Boyd* since 1886 and *Gouled* since 1921. This opinion is designed to provoke a review by this court of a problem that has perplexed the law review writers for the past 40 years.

California is a strong court. Some states will follow Thayer and some will not. In order to establish uniformity of state search warrant procedure, Thayer must be reviewed by this court.

Respectfully submitted,

JOSEPH A. BALL,
Attorney for Petitioners.

APPENDIX.

Opinion of the Supreme Court of the State of California.

In the Supreme Court of the State of California, in Bank.

The People, Plaintiff and Respondent, v. Joseph H. Thayer and Judith Magruder, Defendants and Appellants. Crim 9272.

Filed Dec. 6, 1965.

Defendants Thayer and Magruder were convicted of 22 counts of violating section 72 of the Penal Code by submitting false and fraudulent claims to the Bureau of Public Assistance of Los Angeles County and of conspiring to submit such claims. They appeal from the judgments on the sole ground that records used as evidence against them were unconstitutionally obtained.

Defendant Thayer is a physician; defendant Magruder is his office assistant. Dr. Thayer treated patients whose medical care was paid for by the Bureau of Public assistance. For each patient he submitted a "medical care statement" to the bureau and certified thereon that he had performed the services described, that the amount was due and unpaid, and that the stated fee represented the entire charge for services to the patient.

At the trial, the prosecution sought to prove that the bureau was billed for services never performed and for services also billed to others. It introduced into evidence medical care statements submitted to the bureau and corresponding medical care records taken from Dr. Thayer's files under a search warrant. Charges for

visits and treatments on the statements were not shown in Dr. Thayer's records. In addition, many of the records contained illegible scrawls or wavy lines corresponding to items billed on the statements. Several of Dr. Thayer's employees testified that they used these records in preparing the statements, and that they were instructed to show at least four visits on each statement whether or not there had been that many visits. There was also testimony that the wavy lines were written by Dr. Thayer to indicate visits or treatments that were to be billed to the bureau even though they had never occurred.

Defendants contend that the seizure of the records and their use as evidence constituted an unreasonable search and seizure and a violation of their privilege against self-incrimination under the Fourth, Fifth, and Fourteenth Amendments to the United States Constitution and corresponding provisions of the California Constitution. They urge that the records could not be seized even under a warrant concededly authorized by statute (Pen. Code, § 1524), because they were merely evidence of crime and not contraband, instruments of crime, or fruits of crime.

The asserted rule that mere evidence cannot be seized under a warrant or otherwise is condemned as unsound by virtually all the modern writers. It is typically described as "unfortunate" (8 Wigmore, Evidence (McNaughton rev. 1961) § 2184(a), pp. 45-46) and is a commonly-used example of a legal absurdity. (See, e.g., Kamisar, *Public Safety v. Individual Liberties: Some "Facts" and "Theories"* (1962) 53 J.Crim.L., C.&P. S. 171, 177; Kaplan, *Search and Seizure: A No-Man's Land in the Criminal Law* (1961) 49 Cal.L.Rev. 474,

477-479; Comment, *Limitations on Seizure of "Evidentiary" Objects: A Rule in Search of a Reason* (1953) 20 U.Chi.L.Rev. 319; Traynor, *Mapp v. Ohio At Large in the Fifty States,* 1962 Duke L.J. 319, 330-331.) Although often invoked in cases involving the seizure of papers, the rule is not limited to papers at all but purports to prohibit the seizure of any object that is merely evidentiary. The rationale for this curious doctrine has never been satisfactorily articulated. It creates a totally arbitrary impediment to law enforcement without protecting any important interest of the defendant. A person has a constitutional right to be secure from unreasonable searches and seizures by the police. When the search itself is reasonable, however, it is impossible to understand why the admissibility of seized items should depend on whether they are merely evidentiary or evidentiary plus something else. The rule seems to have its basis in property concepts, in a theory that the sovereign may seize only those objects that it is illegal to possess, or to which the sovereign may assert a claim because they have been wrongfully obtained or used. (Gouled v. United States (1921) 255 U.S. 298, 309.) The modern view, however, is that the exclusionary rules of evidence exist primarily to protect personal rights rather than property interests, and that common-law property concepts are usually irrelevant. (Jones v. United States (1960) 362 U.S. 257, 266.) Determining the admissibility of evidence on the basis of the sovereign's right at common law to replevy the items is anachronistic. It inevitably gives rise to technical rules that are entirely unrelated to the real issues of individual privacy and law enforcement that are involved.

Although property notions fathered the rule, some of the opinions imply that its major purpose is to prevent exploratory searches. (See, e.g., United States v. Lefkowitz (1932) 285 U.S. 452, 465-466.) If that is the purpose of the rule, it is certainly not its effect. The rule does not prevent exploratory searches at all; it prevents the seizure of mere evidence in the course of any search, reasonable or unreasonable, specific or general. It has also been suggested that the rule protects privacy by preserving a man's most private papers from any scrutiny or seizure, however reasonable. (Comment (1953) 20 U.Chi.L.Rev. 319, 327.) The difficulty with this rationale is that the rule protects, not private papers, but mere evidence. "There is no special sanctity in papers, as distinguished from other forms of property, to render them immune from search and seizure, if only they fall within the scope of the principles of the cases in which other property may be seized." (Gouled v. United States (1921) 255 U.S. 298, 309.) Private papers that are the instrument of crime, such as a spy's code books (Abel v. United States (1960) 362 U.S. 217) may be seized. Finally, it is impossible to sustain the mere evidence rule as a corollary of the privilege against self-incrimination. It is not limited to self-incriminating writings, and when such writings are obtained by seizure, instead of by subpoena, the defendant does not impliedly admit their genuineness. (See Maguire, Evidence of Guilt (1959) p. 23; Meltzer, *Required Records, the McCarran Act, and the Privilege Against Self-Incrimination* (1951) 18 U.Chi.L.Rev. 687, 700; cf. Boyd v. United States (1886) 116 U.S. 616.) Moreover, the papers are no less self-incriminating when they can be classified as contraband, instruments of crime, or fruits of crime.

In California, the mere evidence rule is rejected by statute. (Pen. Code, § 1524, subd. 4.) Defendants contend, however, that Mapp v. Ohio (1961) 367 U.S. 643, Ker v. California (1963) 374 U.S. 23, and Malloy v. Hogan (1964) 378 U.S. 1, compel us to accept it. The *Mapp* and *Ker* cases held that a state must exclude evidence uncovered by an unreasonable search and that the standard of reasonableness is the same under the Fourth and Fourteenth Amendments. Malloy v. Hogan held that the standard for determining the availability of a claim of the privilege against self-incrimination is the same under the Fifth and Fourteenth Amendments. Federal rules based on the supervisory power of the United States Supreme Court over the administration of justice in the federal courts, however, are not binding on the states. (Ker. v. California (1963) 374 U.S. 23, 33.)

Defendants contend that Gouled v. United States (1921) 255 U.S. 298, adopted the mere evidence rule as a constitutional standard. Although the court in *Gouled* purported to rest its holding on the Fourth and Fifth Amendments, it did not rely on any specific constitutional language. There are compelling reasons, moreover, for not blindly accepting that opinion at face value. Mapp v. Ohio, supra, 367 U.S. 643, created problems that were totally unforeseen in 1921, when the *Gouled* opinion was written. The court that decided *Gouled* could not have known that basing its decision on the Constitution, rather than on the court's power to prescribe rules of evidence for the federal courts, might one day have the consequence of imposing the rule upon the states. Ker v. California has now recognized that the purpose of the distinction between con-

stitutional and supervisory rules is to separate fundamental civil liberties, which the states must respect, from federal procedural rules, which the states may ignore. Opinions written before this distinction assumed its present crucial importance may have to be reinterpreted in the light of "the demands of our federal system." (Ker v. California, supra, 374 U.S. at p. 33.)

Gouled v. United States is a particularly apt candidate for such reinterpretation, for its adoption of the mere evidence rule as a constitutional standard was not necessary to the result in the case. The validity of a warrant authorizing the seizure of materials stipulated to be merely evidentiary was challenged. The federal statute under which the warrant was issued authorized seizure only when the property was "stolen or embezzled" or "used as the means of committing a felony". (40 Stat. 228.) Instead of basing its decision on the statute the court said that the search and seizure violated the Fourth and Fifth Amendments. Perhaps it meant no more than that the seizure was unconstitutional because seizures that exceed statutory authority are always unreasonable.

The Supreme Court itself has not treated the *Gouled* rule as a fundamental constitutional standard. Although the rule is now set forth in Federal Rules of Criminal Procedure, rule 41(b), the court has refused without explanation to apply it to evidence other than tangible objects, such as that obtained by electronic devices designed to intercept conversations, although no policy reason for the distinction suggests itself. (On Lee v. United States (1952) 343 U.S. 747, 753.) No Supreme Court case since *Gouled* has excluded evidence solely because of the *Gouled* rule. The rule has been distin-

guished nearly out of existence by the instrumentality exception. The *Gouled* case recognized that instruments used in the commission of crime may be seized because of the public's interest in preventing their use in subsequent crimes. This policy, however, furnishes no justification for the use of the instrument as evidence if such use would otherwise violate the Fourth and Fifth Amendments. It is not necessary to use the instrument as evidence to prevent its use in future crimes. Sending the owner to prison may prevent future crimes, but this consideration applies to mere evidence as well as instrumentalities. The same might be said of the other categories of evidence that may be seized, contraband and the fruits of crime. Certainly the sovereign or the rightful owner may replevy such items, but why the admission of evidence should turn on the law of replevin is a mystery. (See State v. Bisaccia (N.J. 1965) 34 U.S.L.Week 2093.) Nor is it clear by what means it can be determined whether or not an object is the instrument or fruit of crime until the owner's guilt or innocence is determined at the trial.

The first Supreme Court case to interpret the *Gouled* rule was also the first case to use the instrumentality exception to restrict its scope severely. In Marron v. United States (1927) 275 U.S. 192, federal officers lawfully entered a saloon and observed illegal sales of liquor. They then arrested the employees and patrons, and seized a business ledger and some utility bills. The search and seizure were held reasonable because they were incident to an arrest, and the ledger and bills were admitted into evidence. The court met the assertion that the *Gouled* rule required their exclusion by holding that utility bills and business accounts are

convenient if not necessary for conducting an illegal liquor business and are therefore seizable instrumentalities of the crime. No one claimed that seizure of the ledger and bills would in any way prevent future crimes except by enabling the government to obtain convictions.

It is contended that the Supreme Court retreated somewhat from this position in United States v. Lefkowitz (1932) 285 U.S. 452. In *Lefkowitz*, as in *Marron*, federal agents raided an illegal liquor business and seized a number of items, including business records and utility bills. The difference was that in *Lefkowitz* the officers did not limit themselves to seizing items plainly visible, but made a thorough search of the drawers, cabinets and wastebaskets. The court suppressed the evidence because the search was too broad, and because the items seized were mere evidence. The manner in which Marron v. United States was distinguished, however, hardly served to reinforce the *Gouled* rule. In *Marron*, the court said, the search was reasonable and the items were held to be instruments of the crime. Since the items seized and the offense charged were almost precisely the same in both cases, the distinction between the two cases was only the scope of the search. When the search was so broad as to be exploratory in nature, the mere evidence rule was resurrected as an alternative (and superfluous) ground for exclusion. When the search was otherwise reasonable, the same items became instruments of crime.

Marron and *Lefkowitz* set the pattern for future treatment of the *Gouled* rule in the Supreme Court. Although the rule was never expressly repudiated, evidence was never suppressed because of it. In nearly

every case the central issue was the legality of a search incident to an arrest. (Davis v. United States (1946) 328 U.S. 582, 595; Zap v. United States (1946) 328 U.S. 624, 632-633; Harris v. United States (1946) 331 U.S. 145, 154; Abel v. United States (1960) 362 U.S. 217, 234-238.) A typical treatment of the rule is found in Zap v. United States, supra, in which the disputed issue was whether incriminating evidence (a check) could be seized in the course of a search to which the defendant had consented by contract. The court held that since the search was lawful the agents could have copied the check and used the copy as evidence; therefore no purpose would be served by holding that consent to the search was not also consent to the seizure. (328 U.S. at pp. 629-630.) The dissent raised the mere evidence rule, but appeared to assume with the majority that the check could nonetheless be seized under a warrant. (*Id.* at pp. 623-633.) While Zap v. United States does not expressly abolish the rule, it saps it of all vitality. To say that the prosecution could introduce copies of Dr. Thayer's records but not the originals would be nonsense. "There is no war between the Constitution and common sense." (Mapp v. Ohio (1961) 367 U.S. 643, 657.)

Thus the *Gouled* rule is often cited but no longer applied. Its claim to constitutional standing rests on a single case in which it was not necessary to decide any constitutional issues. It has been distinguished to the point of extinction in subsequent opinions by the use of technical exceptions and without discussion of policy. It is universally criticized by the writers, and lacks a clear basis in any constitutional language. Ker v. California, which was concerned with entirely different

substantive issues, contains no indication that such a dubious technical rule will be imposed upon the states. We hold that the mere evidence rule is not a constitutional standard and has no application in California. Other state courts that have recently considered the matter have come to the same conclusion. (State v. Bisaccia (N.J. 1965) 34 U.S.L.Week 2093; People v. Carroll (1964) 38 Misc.2d 630 [238 N.Y.S.2d 640].)

Even if the mere evidence rule were a constitutional standard, it would not require the exclusion of Dr. Thayer's medical care records, for they were the instruments of crime. The employees testified that they used the records to draw up the fraudulent statements. In some cases Dr. Thayer placed wavy lines on the records to indicate that false billings were to be made. Under the cirumstances, these records were more instrumental in the commission of the crime than were the utility bills and ledger in Marron v. United States, supra, 275 U.S. 192, and the code books in Abel v. United States, supra, 362 U.S. 217. (See also Matthews v. Correa (2d Cir. 1943) 135 F.2d 534; Landu v. U.S. Attorney (2d Cir. 1946) 82 F.2d 285, cert. den. 298 U.S. 665.)

Finally, it should be noted that there are some opinions that construe Gouled v. United States to protect privacy by preserving private papers, such as a personal diary, from any seizure. (Davis v. United States (1946) 328 U.S. 582, 595 [Frankfurter, J., dissenting]; United States v. Boyette (4th Cir. 1962) 299 F.2d 92; United States v. Stern (D.C.S.D.N.Y. 1964) 225 F.Supp. 187.) This construction is contrary to the opinion of the court in *Gouled,* but even if there is

such a rule, it would not prevent the seizure of business files such as the medical records in this case, which were freely open to the doctor's numerous employees. That business records are not constitutionally protected from properly authorized searches and seizures is indicated not only by Marro v. United States, supra, 275 U.S. 192, and Zap v. United States, supra, 328 U.S. 624, but also by the doctrine that records that are required by law to be kept are not protected by the privilege agaist self-incrimiation. (Shapiro v. United States (1948) 335 U.S. 1.)

The judgments are affirmed. The appeals from the nonappealable orders denying motions for a new trial are dismissed.

Traynor, *C. J.*

We Concur:

McComb, *J.*
Peters, *J.*
Tobriner, *J.*
Peek, *J.*
Mosk, *J.*
Burke, *J.*